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9 Attorneys for Official Committee of Unsecured Creditors

10 **UNITED STATES BANKRUPTCY COURT**
 11 **DISTRICT OF NEVADA**

12 **In re:**

13 **USA Commercial Mortgage Company**
 14 **06-10725 – Lead Case**

15 **USA Capital Realty Advisors, LLC**
 16 **06-10726**

17 **USA Capital Diversified Trust Deed Fund,**
 18 **LLC**
 19 **06-10728**

20 **USA Capital First Trust Deed Fund, LLC**
 21 **06-10728**

22 **USA Securities, LLC**
 23 **06-10729**

Debtors.

Jointly Administered

Chapter 11 Cases

Judge Linda B. Riegle Presiding

Date: January 31, 2007 requested
 Time: 9:30 a.m. requested

Affecting:

- .. All Cases
- or Only:**
- USA Commercial Mortgage Company
- .. USA Capital Realty Advisors, LLC
- .. USA Capital Diversified Trust Deed Fund, LLC
- .. USA Capital First Trust Deed Fund, LLC
- .. USA Securities, LLC

24 **APPLICATION PURSUANT TO FED. R. BANKR. P. 2014(a) FOR ORDER**
 25 **UNDER SECTION 1103 OF THE BANKRUPTCY CODE AUTHORIZING THE**
 26 **EMPLOYMENT AND RETENTION OF DIAMOND McCARTHY TAYLOR**
 FINLEY & LEE, LLP AS SPECIAL LITIGATION COUNSEL TO THE OFFICIAL
 UNSECURED CREDITORS' COMMITTEE FOR USA COMMERCIAL
 MORTGAGE COMPANY

27 **TO THE HONORABLE LINDA B. RIEGLE, U.S. BANKRUPTCY JUDGE:**

28 The Official Unsecured Creditors' Committee for USA Commercial Mortgage
 29 Company (the "Committee") respectfully requests that the Court approve the employment



1 and retention of Diamond McCarthy Taylor Finley & Lee, LLP ("Diamond") as special
2 litigation counsel to the Committee. In support of this application, the Committee
3 respectfully states as follows:

4 **I. BACKGROUND**

5 1. On April 13, 2006 (the "Petition Date") USA Commercial Mortgage
6 Company ("USACM"), USA Capital Diversified Trust Deed Fund, LLC ("Diversified"),
7 USA Securities, LLC ("Securities"), USA Capital Realty Advisors, LLC ("Realty") and
8 USA Capital First Trust Deed Fund, LLC (First), ("USACM" and collectively with
9 Diversified, Securities, Realty and First, the "Debtors") filed voluntary petitions for relief
10 under chapter 11 of the U.S. Bankruptcy Code ("Bankruptcy Code").

11 2. Debtors continue to operate their business and manage their properties as
12 debtors-in-possession pursuant to §§ 1107 and 1108 of the Bankruptcy Code.

13 3. On May 10, 2006, the Office of the United States Trustee (the "U.S.
14 Trustee") appointed the Committee along with three other committees in the Debtors'
15 jointly administered Cases.

16 4. On January 8, 2007 an Order Confirming Debtors' Third Amended Plan of
17 Reorganization (the "Confirmation Order") was entered.

18 5. In addition, the Confirmation Order approved the Liquidating Trust
19 Agreement for USACM and Geoffrey L. Berman as Trustee (the "Trustee") of the
20 USACM Liquidating Trust as successor to USACM upon the Effective Date of the Plan.

21 6. The Trustee, subject to the Plan becoming effective, interviewed potential
22 special litigation counsel to investigate and pursue litigation against the insiders and
23 affiliates of Debtors, including without limitation former officers and directors Thomas
24 Hantges, Joseph Milanowski and their affiliate USA Investment Partners, LLC. Members
25 of the USA Liquidating Trust Committee, including representatives of the Official
26



1 Committee of Equity Security Holders of USA Capital Diversified Trust Deed Fund, LLC
2 participated in the interview process.

3 7. After the interview, the Trustee selected Diamond as special litigation
4 counsel to the Trust on January 12, 2007, subject to the Plan becoming effective.

5 8. The Committee believes it is imperative that special litigation counsel be
6 employed by the Committee as of January 12, 2007, on an interim basis, to investigate the
7 causes of action against various third parties. Delaying that employment, and the work of
8 counsel, until the uncertain Effective Date of the Plan may delay the investigation and
9 prosecution of causes of action that are important sources of recovery for unsecured
10 creditors of USACM under the Plan.

11 9. Diamond has agreed that it shall be compensated solely by the Trust. In
12 other words, while Diamond will be employed by the Committee under the Effective Date
13 of the Plan, and then by the Trust, Diamond will look solely to the Trust for compensation.
14 Since no compensation is due from the estate or the Committee, we have not included
15 information about Diamond's rates or charges. In fact, the Trustee believes that the targets
16 of Diamond's investigation have no need to know the terms of the Trust's retention
17 agreement with Diamond.

II. JURISDICTION

19 10. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and
20 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before
21 this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicate for the relief
22 sought herein is 11 U.S.C. §§ 327(e), 328 and 1103(a).

III. RELIEF REQUESTED

24 11. By this Application, the Committee seeks to employ and retain Diamond
25 pursuant to §§ 327(e), 328(a) and 1103(a) of the Bankruptcy Code as special litigation
26 counsel for the Committee in the Case as of January 12, 2007.



1 12. The Committee is familiar with the professional standing and reputation of
2 Diamond. The Committee understands and recognizes that Diamond has extensive
3 experience in the following practice areas of: Complex Business and Commercial
4 Litigation; Insolvency and Professional Liability Litigation; Complex Bankruptcies,
5 Reorganizations and Work-Outs; and International Litigation and Arbitration. Diamond
6 enjoys an excellent reputation for services it has rendered in large and complex chapter 11
7 cases on behalf of debtors and creditors throughout the United States. It has successfully
8 pursued similar causes of action, including on behalf of the post-confirmation entity in
9 AgriBioTech, Inc. before this Court in connection with, among other things, officer and
10 director breach of fiduciary duty claims involving more than \$80 million in damages.

11 13. The services of Diamond are deemed necessary to enable the Committee to
12 investigate potential causes of action against various third parties whose actions caused
13 loss to the Debtors' estates, particularly insiders and their affiliates. Further, Diamond is
14 well qualified and able to represent the Committee in a cost-effective, efficient and timely
15 manner.

16 **IV. SCOPE OF SERVICES**

17 14. Diamond will provide such litigation services to the Committee and its legal
18 advisors as they deem appropriate and feasible in order to advise the Committee in the
19 course of the Case, particularly investigation of claims against the insiders and their
20 affiliates. Until the Effective Date of the Plan, the Committee is, of course, limited in its
21 standing to prosecute causes of action.

22 **V. ELIGIBILITY FOR EMPLOYMENT**

23 15. Diamond has informed the Committee that, except as may be set forth in the
24 affidavit of Allan B. Diamond (the "Diamond Affidavit") filed simultaneously herewith
25 and incorporated for all purposes herein by this reference, Diamond does not represent or
26 have any connection with any other entity having an interest adverse to the Debtor, the



1 estate or the Committee with respect to the matter on which Diamond is to be employed,
2 and therefore believes it is eligible to represent the Committee under 11 U.S.C. §§ 327(e),
3 328(a) and 1103(b) of the Bankruptcy Code.

4 16. Diamond will conduct an ongoing review of its files to ensure that no
5 conflicts or other disqualifying circumstances exist or arise. If any new material facts or
6 relationships are discovered, Diamond will supplement its disclosure to the Court.

7 17. Diamond has agreed not to share with any person or firm the compensation
8 to be paid for professional services rendered in connection with this case.

9 **VI. TERMS OF RETENTION**

10 18. Diamond did not represent any of the Debtors before the bankruptcy filings
11 and so is not owed any amounts with respect to pre-petition fees and expenses.

12 19. The Committee understands that Diamond intends to look solely to the
13 USACM Liquidating Trust for compensation and reimbursement of its expenses for its
14 services in accordance with the applicable provisions of the confirmed Plan and the
15 USACM Liquidating Trust agreement.

16 20. There is no agreement or understanding between Diamond and any other
17 entity for the sharing of compensation to be received for services rendered in or in
18 connection with the Case, except as permitted under Bankruptcy Code § 504(b)(1).

19 **VII. NO PRIOR REQUEST**

20 21. No prior Application for the relief requested herein has been made to this or
21 any other Court.

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VIII. CONCLUSION

WHEREFORE, the Committee respectfully requests the Court to enter an Order authorizing the Committee to employ and retain Diamond as special litigation counsel for the Committee as of January 12, 2007 for the purposes set forth above, and grant such further relief as is just and proper.

RESPECTFULLY SUBMITTED January 18, 2007.

LEWIS AND ROCA LLP

By /s/ RC (#006593)
Susan M. Freeman
Rob Charles
*Attorneys for Official Unsecured Creditors
Committee for USA Commercial Mortgage
Company*